



POLICE DEPARTMENT

December 5, 2012

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Lei Cui
Tax Registry No. 945634
32 Precinct
Disciplinary Case No. 2011-4108

Police Officer Juan Diaz
Tax Registry No. 946933
24 Precinct
Disciplinary Case No. 2011-4107

The above-named members of the Department appeared before the Court on September 4, 2012, charged with the following:

Disciplinary Case No. 2011-4108

1. Said Police Officer Lei Cui, assigned to the 32nd Precinct, while on duty, on or about February 24, 2011, at a location known to the Department in New York County, failed to properly safeguard a prisoner, resulting in said prisoner's temporary escape.

P.G. 203-10, Page 1, Paragraph 5 – GENERAL REGULATIONS
P.G. 208-06, Page 1, Paragraph 5 – ARREST – SECURITY MEASURES

Disciplinary Case No. 2010-4107

1. Said Police Officer Juan Diaz, while assigned to the 32nd Precinct, while on duty, on or about February 24, 2011, at a location known to the Department in New York County, failed to properly safeguard a prisoner, resulting in said prisoner's temporary escape.

P.G. 203 10, Page 1, Paragraph 5 GENERAL REGULATIONS
P.G. 208 06, Page 1, Paragraph 5 ARREST SECURITY MEASURES

The Department was represented by Penny Bluford Garrett, Department Advocate's Office. Respondents were represented by John Tynan, Esq., Worth, Longworth & London LLP.

Respondents, through their counsel, pleaded Guilty to the subject charges and testified in mitigation of the penalty. A stenographic transcript of the mitigation record has been prepared and is available for the Police Commissioner's review.

DECISION

Respondents, having pleaded Guilty, are found Guilty.

SUMMARY OF EVIDENCE IN MITIGATION

Respondents both testified on their own behalf.

Respondent Diaz

Respondent Diaz currently was assigned to the 24 Precinct. On February 24, 2011, however, he was assigned to the 32 Precinct. He was assigned to patrol with Respondent Cui in a radio motor patrol (RMP) vehicle, covering sector George. Respondent Cui was the operator and Respondent Diaz was the recorder. Prior to February 2011, Respondent Diaz had made 25 to 30 arrests in his career. He had never worked with Respondent Cui before that time.

On the date in question, Respondent Diaz testified that he was involved in the arrest of Person A. The arrest took place on Eighth Avenue between 143rd and 144th Streets. Respondent Diaz testified he observed Person A holding a cup, which Respondent believed contained alcohol. Respondent Diaz told Respondent Cui to stop the vehicle. Respondent Diaz

approached Person A to ask him for identification. Person A gave Respondent Diaz identification, and Respondent Diaz gave it to Respondent Cui to conduct a warrant check.

Respondent Diaz testified that there was alcohol in the cup Person A was holding. Respondent Cui informed him that Person A had an active warrant. Respondent Diaz attempted to handcuff Person A, who resisted. Person A shoved him and tried to walk toward 143rd Street. Backup officers arrived and apprehended Person A. The arrestee was placed in the back seat of Respondent Diaz's RMP with the assistance of Respondent Cui.

Respondent Diaz testified that he walked to the front of the RMP, "where the rest of the guys that were involved in the situation were. We started talking and making sure everybody was okay." Respondent Diaz admitted that his back was to the passenger side of the car where Person A was seated.

The officers were speaking for two minutes when Police Officer William Flaherty, who had walked to the back of the RMP to check on Person A, notified Respondent Diaz that he was not in the back of the RMP.

Respondent Diaz stated that he did not see any handcuffs. The officers "started surveying the area and see what happened," but they "were still in a state of shock." Respondent Diaz did not make any radio transmissions, but Respondent Cui requested that the patrol supervisor respond.

Respondent Diaz learned that after escaping from the RMP, Person A was apprehended three to four hours later, still within the confines of the 32 Precinct. He also learned that the back doors of the RMP were "defective." When asked what this meant, Respondent Diaz said that "[t]hey were unable to be locked." When asked, "Meaning the child safety lock that locks the doors from opening from the inside was inoperable," Respondent Diaz agreed.

On cross examination, Respondent Diaz stated that when he first tried to handcuff Person A and Person A resisted, Person A only got five to ten steps away before he was apprehended by Respondent Diaz and other officers.

After Person A was apprehended, Respondent Diaz placed him in the back of the RMP and shut the door. Respondent Diaz admitted not placing a seatbelt on Person A. He conceded that it was standard procedure to use a seatbelt after placing a person in the back of an RMP. Respondent Diaz closed the door to the RMP but did not check if the doors were locked. He did not know if they were locked.

Respondent Diaz asked the other officers if they were okay "because we had a little scuffle." He asserted that the RMP, and Person A, were to his right side, not to his back. He admitted that he did not maintain constant observation of Person A.

Respondent Diaz stated that it was approximately one or two minutes from when he was speaking to the officers in front of the RMP until Flaherty informed him that Person A was no longer there. Respondent Diaz acknowledged that during this conversation, he thought Respondent Cui was next to the driver's side door.

On re-direct examination, Respondent Diaz agreed that he was required to check from the outside of the RMP every time a person was placed in the vehicle to see if the door was locked. Respondent Diaz testified that after Person A escaped, Respondent Cui informed Respondent Diaz that the doors to the RMP did not lock properly "from the inside."

Upon questioning by the Court, Respondent Diaz stated that he did not seatbelt Person A because there were so many things going on at the moment.

Respondent Cui

Respondent Cui was assigned to the 32 Precinct. On February 24, 2011, he had made or participated in 25 to 30 arrests while working there.

Respondent Cui testified that he had used the RMP in question before, but had problems with it because the automatic door locks did not work. One had to lock the car manually, but, Respondent Cui asserted, the back doors would “[a]lways not lock.” Respondent Cui knew about this for a week or two prior to the incident. He knew that complaints had been made about the vehicle because the RMP board at the command said that the door lock was broken.

Respondent Cui did not remember who assigned him the RMP on February 24, 2011. He had a different RMP earlier in the tour, but there was a safety issue with that car’s driver-side seatbelt, so he was reassigned the RMP with the broken lock.

On the date in question, Respondent Cui testified, he worked part of his tour with Respondent Diaz, with whom he never had worked before. While on patrol, Respondent Cui participated in an arrest of Person A. When he learned that Person A had a warrant, he yelled “18” to Respondent Diaz, meaning 10-18, the radio signal for an active warrant. He did so, rather than saying “open warrant,” because he did not want to cause the perpetrator to run.

Respondent Cui observed Person A resist arrest by pushing Respondent Diaz. He attempted to run down Eighth Avenue, and was able to go about 20 feet before being apprehended by Respondent Diaz, Flaherty and three others. By the time Respondent Cui arrived from the other side of the RMP, Person A was already in handcuffs.

Once Person A was placed in the RMP, Respondent Cui requested his sergeant to respond to the scene to verify the arrest. Although Respondent Cui observed the doors close, he admitted

that he did not inform anyone at the time about the problems with the lock. "Everything just happened too fast I didn't realize." Person A was placed in the RMP behind the passenger's seat.

Respondent Cui testified that he asked everybody involved if they were all right and awaited the arrival of the sergeant. At this time, Respondent Cui conceded, he had his back to the patrol car.

Respondent Cui testified that Flaherty was the first person to notice Person A was not in the vehicle. When informed of the missing prisoner, the doors to the RMP were closed but Person A was not inside. Respondent Cui testified that two minutes elapsed from the time Flaherty noticed Person A missing and when the patrol supervisor arrived. Respondent Cui did not see any damage to the RMP or handcuffs in the vehicle.

On cross examination, Respondent Cui stated that he thought the seatbelts in the second RMP were working properly even though he did not check. He acknowledged that he knew the door lock was broken for a week. Respondent Cui admitted that he did not inform Respondent Diaz that the door lock was not working.

Respondent Cui stated that after informing Respondent Diaz that Person A had an open warrant, Person A pushed Respondent Diaz and ran south on Eighth Avenue for about 20 feet. Respondent Cui acknowledged that it was only a couple of seconds from the time he found out Person A had an open warrant and when he attempted to flee.

While requesting the sergeant to respond, Respondent Cui was standing by the passenger side front door, facing the RMP. Respondent Cui agreed that he did not maintain constant observation of Person A while he was seated in the RMP. After notifying central radio dispatch of the arrest, Respondent Cui asked the other officers if they were all right. At this time, Respondent Cui was facing the other officers with his back to Person A. Respondent Cui thought it

was all right to have his back to Person A, even though he had fled once already, because he was in handcuffs and placed inside the RMP. Respondent Cui acknowledged that there was, nonetheless, nothing to prevent Person A from escaping because the doors to the RMP were not locked.

Respondent Cui estimated that it was less than a minute from the time he asked the other officers if they were hurt and when he learned Person A had escaped. Once realizing Person A escaped, Respondent Cui explained, "I was nervous, so a lot of things like this came through my mind." Respondent Cui searched for Person A with negative results. The suspect was apprehended two to three hours later.

Upon questioning by the Court, Respondent Cui confirmed that the rear doors could have been locked by engaging the child-safety mechanism.

PENALTY

In order to determine an appropriate penalty, Respondents' service records were examined. See Matter of Pell v. Board of Education, 34 N.Y.2d 222 (1974). Respondent Cui was appointed to the Department on January 7, 2008, and Respondent Diaz on July 8, 2008. Information from their personnel files that was considered in making this penalty recommendation is contained in attached confidential memoranda.

Respondents have pleaded Guilty to failing to safeguard a prisoner. While on patrol in the 32 Precinct, they stopped an individual for drinking what appeared to be an alcoholic beverage in public. He was checked for warrants, and when it was announced that he had an open warrant, the individual attempted to flee. After a struggle, and with the help of backup officers, Respondents were able to restrain the suspect. He was handcuffed and placed in the

rear of Respondents' RMP. The door was closed. According to Respondent Cui, who was familiar with the vehicle, the rear doors did not lock. The child-safety override, however, could have been implemented. Respondent Diaz admitted not seatbelting the suspect into the RMP.

In any event, the rear doors were left unlocked. As the officers gathered at the front of the RMP discussing the incident and making sure they were all okay, one of the backup officers noticed that the arrestee no longer was in the RMP. The patrol supervisor was alerted, and Respondent Diaz testified that the arrestee was found within the confines of the 32 Precinct after three or four hours.

While Respondents' counsel suggested a penalty of 10 vacation days, the Department recommended 20 vacation days. The recommendation was based on *Case No. 84647/08* (Feb. 22, 2011) and *Case No. 86031/10* (Dec. 29, 2010). In the 2011 case, the officer received a penalty of 21 days already served on suspension for failing to safeguard a prisoner and to notify a supervisor immediately about an escape. In the 2010 case, the officer received a penalty of 22 suspension days already served for failing to keep a hospitalized prisoner under constant observation, resulting in the prisoner's escape. Instead of watching the prisoner, the officer was on his laptop.

The most immediate difference between the cited cases and the instant case is that those two other officers were suspended after the incidents. That indicates that supervisors at the time saw the events as serious lapses in procedure. In the instant case, neither Respondent was suspended. They were not conducting personal business or ignoring the prisoner. Rather, they were engaged in police business, speaking with the backup officers to determine whether everyone was alright. After the prisoner escaped, Respondents immediately notified the patrol supervisor and helped in the search for the escapee. Cf. *Case No. 2010-2857* (Jan. 24, 2012) (20

pre-trial suspension days for failing to safeguard prisoner, resulting in escape, and failing to report escape immediately to patrol supervisor or platoon commander). Moreover, both of the cited cases involved negotiated penalties. Their precedential effect is limited because those officers might have had reasons for accepting a penalty in line with that recommended by the Department in the case at bar.

Case Nos. 78884-85/03 (Sept. 14, 2004) are most in line with the instant facts. There, the two respondents were transporting a prisoner in an RMP. He was able to escape because of a faulty child-safety mechanism. The decision noted that if the respondents, inter alia, had been monitoring the prisoner visually, as required by Patrol Guide § 208-06 (charged in the instant case as well), the prisoner would not have escaped, regardless of the child-safety device. Each respondent received 10 penalty days.

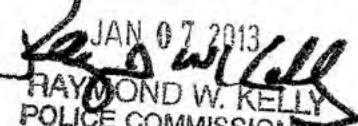
The same penalty is appropriate here as well. Respondents should have paid constant attention to the prisoner in light of the alleged deficiency in the RMP, much less engaged the child safety mechanism, rather than turning away for as much as two minutes. This is even more so in light of the fact that the prisoner already had tried to run when officers first tried to handcuff him. Nevertheless, Respondents were taking police action the entire time and, when the escape was noticed, they assisted in the prisoner's recapture and notified proper supervisors.

Accordingly, the Court recommends that each Respondent forfeit 10 vacation days. See *Case No. 2010-3202* (Mar. 29, 2011) (10 days for failing to safeguard a prisoner whom officer had handcuffed to metal bar inside a room; detective then left prisoner alone, allowing her to escape).

Respectfully submitted,



David S. Weisel
Assistant Deputy Commissioner ■ Trials

APPROVED
JAN 07 2013

RAYMOND W. KELLY
POLICE COMMISSIONER

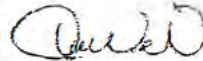
POLICE DEPARTMENT
CITY OF NEW YORK

From: Assistant Deputy Commissioner – Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER LEI CUI
TAX REGISTRY NO. 945634
DISCIPLINARY CASE NO. 2011-4108

Respondent received overall ratings of 3.5 “Competent/Highly Competent” in his 2011 and 2010 annual evaluations, and a 3.0 “Competent” in his 2009 22-month probationary evaluation. [REDACTED]

[REDACTED] He has no prior formal disciplinary record.

For your consideration.



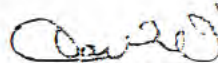
David S. Weisel
Assistant Deputy Commissioner Trials

POLICE DEPARTMENT
CITY OF NEW YORK

From: Assistant Deputy Commissioner Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER JUAN DIAZ
TAX REGISTRY NO. 946933
DISCIPLINARY CASE NO. 2011-4107

In his annual evaluations for 2011 and 2010, and in a 3-month interim evaluation in 2011, Respondent received overall ratings of 2.5 "Below Competent." [REDACTED]
[REDACTED] In 2010, he was placed on Level II Performance Monitoring as a result of two below-standards evaluations. He has no prior formal disciplinary record.

For your consideration.



David S. Weisel
Assistant Deputy Commissioner Trials